IN THE COURT OF JUDICATURE AT BOMBAY

ORIGINAL SIDE JURISDICTION

COMPANY PETITION NO.366 OF 2006

In the matter of Sections 433, 434 and 439 of the Companies Act, I of 1956
AND
In the matter of M/s. Laul Steels P.Ltd

M/s. Global Wool Alliance P.Ltd
....Petitioners

Mr.Shyam Mehta i/by. Federal & Rashmikant
for the petitioners.
Mr.Kevil Setalvad with Sanjay Sinha
for the respondents.

CORAM: S.C. DHARMADHIKARI, J.

12th January, 2007.

P.C :-

1. This is a petition for winding up of the respondent company.

2. The case of the petitioners is that on/or about 1.4.1996 they entered into an employment

agreement with one Prem Mehra, who is also a Director of M/s. Laul Steel Private Limited (respondent herein). The agreement inter-alia records that the petitioner would appoint said Mr.Prem Mehra as Managing Director of the petitioner company on the terms and conditions, more particularly, set out therein. It is not in dispute that one of the terms and conditions of this appointment stipulates that Mr.Mehra would be entitled to the expenditure for hiring furnished accommodation. Thereafter, the terms of his employment were modified by a supplemental agreement dated 29.11.2002 but the stipulation continues.

3. It appears that the said Mr.Mehra who is the Director of the respondent company was at the relevant time residing in Flat No. 132/B, Urvashi, Napeansea Road, Mumbai.

4. It appears that an agreement was entered between the said Mr.Mehra and the petitioner with regard to the stipulation of providing housing accommodation. That agreement stipulates that since

Mr.Mehra was occupying the Flat at Napean Sea Road and it belonged to the respondent company in which he was the Director, Mr. Mehra would continue to occupy the said flat while in employment of the petitioner as its Managing Director. Accordingly, a leave and licence agreement was entered into on 1.4.1996 between the respondent company and the petitioner. It is stipulated therein that the respondent is a member of Malabar Hill Co-operative Housing Society Ltd and owns five shares of the said society. As a member of the society, the respondent company is seized and possessed so also is entitled to hold use and occupy the flat and that the same is given to the petitioner as licensee on the terms stipulated therein.

5. For the purpose of the present petition, Clause 3 to 5 of this agreement are relevant and they are reproduced herein below :-

> "3. It is agreed between the LICENSOR and LICENSEE that the said premises will be occupied by Mr.Prem Mehra, the Managing Director of the LICENSEE alongwith the members of his family and servants.
>
> 4. The LICENSOR has agreed to give for

use on Leave and License basis the said premises to the LICENSEE with effect from the 1st day of April, 1996 for monthly compensation of Rs.9,000/- (Rupees Nine Thousand Only) for a period of 11 months, i.e. upto and including 1st day of March, 1997 time being the essence. The license fee shall be paid within 10 days of expiry of each month of the license period.

. Within a period of one month from the date of execution of these present, the LICENSEE shall pay to the LICENSOR an amount of Rs.50,00,000/- (Rupees Fifty Lacs Only) as interest fee refundable Security Deposit. The amount of interest free refundable Security Deposit (hereinafter referred to as the Security Deposit) to be shall be refunded by the LICENSOR to the LICENSEE only against the vacating of the said premises by the LICENSEE and duly performing other terms and conditions of this Agreement.

6. By these clauses it was agreed that the premises will be occupied by Mr. Prem Mehra, Managing Director of the Licensee alongwith members of his family and servants. The license fee would be as stipulated in Clause 4 whereas the interest fee refundable Security Deposit was to the tune of Rs.50 lacs. It was liable to be refunded on the licensee vacating the premises and duly performing the other terms and conditions of the agreement.

7. The petitioners point out that subsequently

the Leave and License agreement was renewed and the last renewal is upto 31.5.2005. The security deposit of Rs.50,00,000/- is admittedly furnished. Relying upon Clause 15 of the Leave and License agreement, it is contended by the petitioners, that the licensee was bound to vacate the premises on/or before the expiry of the period stipulated or/on Mr.Mehra ceasing to be the Managing Director of the petitioner whichever is earlier.

8. It is thus contended, that, the services of Mr. Mehra as Managing Director were terminated at a Board meeting and the decision to that effect is recorded in the minutes, copy of which is annexed as Annexure D to the petition. The services of Mr.Mehra were terminated and he was informed accordingly. Thereafter, the petitioner took steps to inform even the respondent of the said termination. The petitioner requested the respondent to refund the sum of Rs.50 lacs.

9. Although, in paras 13 and 14 of this Company Petition, it is stated that the respondent company

was bound and liable to refund the security deposit, it is pointed out that the petitioners informed the respondent that they have vacated the premises and the Security Deposit of Rs.50 lacs be refunded. The copies of the letters in that behalf are annexed to the petitioner as Annexures G, H and I.

10. It is the case of the petitioner, that, subsequently Mr.Mehra was removed even as Director of the petitioner company but his wife and family members have challenged the termination in a suit being Suit No. 961 of 2006 which is pending in this court. According to the petitioners, the issue pertaining to the alleged termination of the Director Mr.Mehra, has nothing to do with the refund of Security Deposit. There is a written agreement under which the monies have been paid and in the written agreement itself the parties have agreed that upon termination of the employment of Mr.Mehra and/or the vacation of the premises by the petitioner, the Security Deposit would become refundable. In such circumstances, the security deposit should be refunded. The statutory notice was sent but there

has been no response. The amount was not refunded nor was any reply given to the statutory notice denying the liability. It is in these facts and circumstances, that the present petition for winding up has been instituted in this court.

11. Mr.Mehta, appearing for the petitioner has contended that there is no warrant for withholding the sum of Rs.50 lacs. The Security Deposit is paid on 25.4.1996. The sum of Rs.50 lacs ought to have been refunded immediately after compliance by the petitioner with the terms of the agreement. Once the terms have been complied with, there is no question of the respondent linking the other issues with their obligation to refund the Security Deposit under the Leave and License agreement. In such circumstances, and when there is no dispute about the facts so also the termination of Mr.Mehra, as Managing Director, refusal to refund the amount should be seen as the Respondents inability to pay the debts and this court should exercise its jurisdiction to wind up the company. Mr.Mehta has also relied upon the Annual Report and other documents and pointed out that the

respondent company is not conducting any business. It has no employees. It has shown in its Books the liability in respect of the Security Deposit i.e. Rs.50 lacs. However, it is not in a position to refund the same. It has become commercially insolvent. Hence for this reason also, this court should exercise its jurisdiction.

12. Mr.Setalvad, on the other hand, has invited my attention to the affidavit-in reply filed on behalf of the respondent and has contended that this is a case where there was an understanding between the petitioner and the respondent. He submits that there is no bar for the respondent to point out the real understanding between the parties. He submits that Section 91 and 92 of the Indian Evidence Act do not bar raising of a plea wherein the parties can point out that the real transaction is something else than the one recorded in the agreement in writing. He submits that in this case it was decided that instead of blocking the funds of the petitioner company for procuring the accommodation for its Managing Director, the petitioner took on Leave and License

basis the flat belonging to the respondent. The agreement was that, for these efforts of the Mehras, they would be compensated by way of non-refundable security deposit which the petitioner would place against the security of the flat. By this arrangement, the petitioner benefited in as much as the current license fees being very high, the license agreement was arrived at for a license fee of Rs.9000/- per month. Mr.Setalvad, submits that when the flat was taken on leave and license, the market trend was such that the price of the flats in the area was more than Rs.1 crore and the monthly license fees/charge were approximately Rs.1 lacs. In such circumstances, it is inconceivable that the parties would agree to have an amount of Rs.50 lacs being refunded, more so, when the arrangement was continued for nearly 10 years.

13. Mr.Setalvad, also submits that the said Mr.Mehra has informed the respondent company that he does not accept the illegal termination as Managing Director. He submits that assuming that the employment is terminated, the parties were to meet

and discuss the matter and arrive at an arrangement for putting an end to the Leave and License agreement. Since no steps were taken by the petitioner for initiation of any talks, after the removal of Mr. Mehra, the petitioner company becomes the licensee and the license not being terminated, the company cannot seek refund of the Security Deposit.

14. My attention is also invited by both sides to the fact that the Income Tax Department had allegedly not treated the transaction as being arrived at arms length. It has treated the deposit as less than the market rate and after an assessment directed the respondent to pay higher income tax and penalty. The submission of Mr.Setalvad is that the petitioner has exercised undue influence, misrepresented the respondent and perpetrated a fraud on him as well as the Income-Tax department. Had this transaction being treated as one at arms length, the respondent would have fetched atleast Rs.70,000/- per month. It is in such circumstances, that it was understood that the security deposit would never be returned. My

attention is therefore invited to paragraph 5 and 6 of the affidavit-in-reply by Mr.Setalvad. He submits that this being the nature of the defence and the petitioner not having acted bonafide, this court should not exercise its jurisdiction under the Companies Act for winding up, but should proceed to dismiss this company petition leaving parties to take recourse to appropriate remedies in law.

15. Mr.Mehta, has invited my attention to the affidavit-in-rejoinder and contended that the affidavit-in-reply is based upon some understanding which is not reflected anywhere in the records. There are no minutes of the meeting in which such understanding is arrived at. The oral arrangement as pleaded cannot run contrary to the written agreement and the stipulations therein. The petitioner cannot be deprived of its monies once the license is terminated so also the employment. All other issues are unconnected and dehors the obligation of the respondent.

16. With the assistance of Mr.Mehta and

Mr.Setalvad, I have perused the petition and the annexures thereto so also the reply and rejoinder. There is much substance in the contention of Mr.Mehta that for the purpose of the controversy in the present petition, the terms and conditions in the leave and licence agreement alone are relevant.

17. Admittedly the leave and license agreement dated 1.4.1996 has been entered into between the petitioner and the respondent. Its execution has not been denied. There is absolutely no dispute that the terms and conditions of this leave and license agreement state that the petitioner is a licensee of the premises which belonged to the respondent. It is only because of the employment of Mr.Mehra with the petitioner and the fact that he was already occupying the premises that clauses in the agreement are worded accordingly. The petitioner entered into this Agreement with Mr.Mehra and termed the occupation on license basis for the compensation stipulated in Clause 4, a term for payment of security deposit which itself is refundable is also included therein. Although, the terms of the leave and licence

agreement contemplate the petitioner handing over the premises to the respondent,it has not been undisputed that Mr.Prem Mehra and his family were already occupying the premises and continued to occupy the same. All that was required on the part of the petitioner was compliance of the terms and conditions of the licence agreement.

18. Before me, there is no much dispute with regard to the termination of the services of Mr.Mehra by a Resolution, copies of which are annexed. It is also not in dispute that by a letter dated 7.12.2005, Mr.Prem Mehra was duly informed about his termination. Merely because the letter records that some arrangement will be made to terminate the license and steps will be taken in that behalf, by that fact alone, the respondent company, prima-facie could not plead that the license agreement was given a go-bye. If that be the position, there was no occasion for the petitioner to address a letter dated 31.12.2005 and point out to the respondent that the Security Deposit should not be handed over to Mr.Mehra or any other party without the consent of

the undersigned i.e. the petitioner, that it is the petitioner who paid and claimed the refund of the Security Deposit is also clear from the letter dated 25.1.2006. This letter is duly received by the respondent but there is no reply.

19. The alleged oral understanding is a plea raised for the first time in the affidavit in reply. It is not substantiated by the respondent. Thus, the pleas based on the averments in the petition having not been controverted, the matter between the Mehras and the petitioner so also the respondent and the Mehras, are not germane atleast, at this stage. The liability to refund the security deposit, prima-facie cannot be denied considering the terms and conditions of the leave and license agreement. I am not shutting out the Respondents straightaway. It would be proper, if at this stage, while giving the Respondents liberty to substantiate their pleas, the interest of the petitioners is also protected.

20. It is not necessary for me to go into the issues raised in the affidavit in reply and the

contentions of Mr.Setalvad in that behalf because, in my view the order that I propose to pass would sub-serve the ends of justice and provide adequate opportunity to the respondent to raise the same in independent proceedings. In my view, at this stage, instead of straight away admitting the petition, a conditional order in the following terms would serve the ends of justice :-

(a) On the condition that the respondent deposits in this court a sum of Rs.50 lacs within a period of 16 weeks from today and files a suit or appropriate proceedings within a period of four weeks thereafter, if it is directed that the sum of Rs.50 lacs would stand credited to the account of the said suit / proceeding and steps be taken by the Registrar/Prothonotary and Senior Master to transmit the same.

(b) In case of default committed by the respondent in compliance with Clause (a) above, this company petition would stand

admitted and thereafter it would be open for the petitioner to take such steps as are permissible in law for prosecution of the same.

(c) In case the amount is deposited and the proceedings are initiated as above, all pleas of both sides in the same are kept open and the deposit would be treated as without prejudice to the rights and contentions of the parties.

(d) It would be equally open for the petitioner to take out appropriate proceedings in case they desire to withdraw the sum deposited and that application to be considered on its own merits and in accordance with law.

sd/-

(S.C.DHARMADHIKARI, J)